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Equitrade International, Inc. et al., FINAL ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CLOSING CASE

John J. Goger
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

EQUITRADE INTERNATIONAL, INC. and JAMES ALAN WEST, Plaintiffs, v. LEE ANNE BUSMAN, Defendant.	CIVIL ACTION FILE NO. 2017CV286507 Business Case Div. 4

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CLOSING CASE

The above styled action is before the Court on Defendant Lee Anne Busman's (Defendant "Busman"[1]) Motion for Summary Judgment. Having considered the entire record and argument of counsel at a March 15, 2019 hearing held in this matter, the Court finds as follows:

SUMMARY OF FACTS

This case has a protracted and tortured history that stems from a 2013 business transaction involving Plaintiff Equitrade International, Inc. ("EI") and its Chief Executive Officer, James Alan West (Plaintiff "West"), on one side and Barter Consultants International, Inc. ("BCI") and its former President/Chief Executive Officer, Defendant Busman, on the other. That transaction has now spawned three lawsuits in this Court.[2]

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[1] It appears Defendant was formerly known as Lee Anne Busman but is now known as Lee Anne Hearn. Because the pleadings and relevant documents for the most part refer to Defendant as Lee Anne Busman, she will be referred to herein as Defendant "Busman."

[2] *See also* Equitrade International, Inc. and James Alan West v. Lee Anne Busman, individually, Barter Consultants International, Inc., and Lee Anne, Inc., Superior Court of Fulton County, No. 2013CV233445 ("2013 Action"); Equitrade International, Inc. and James Alan West v. Lee Anne Busman, Superior Court of Fulton County, No. 2017CV289468 ("2017 Action for Injunctive Relief").

Defendant Busman's ex-husband—Bob Busman—started BCI in December 1999. As described by Defendant, the company provided alternative currency which business owners could use in running their companies by using what was termed BCI "Trade Dollars." Clients would earn Trade Dollars by selling their goods and services and could spend Trade Dollars by purchasing other active members' goods and services. Defendant and Bob Busman divorced in 2011 and pursuant to their divorce agreement Defendant was given the business. She became the Chief Executive Officer of BCI in April 2011.

Although the parties differ in how they describe the transaction, sometime between 2012 and March 2013 EI and BCI reached an agreement whereby BCI would "join" or merge with EI in a new joint venture to be known as "Equitrade Atlanta" (the "2013 Merger Agreement"). According to Plaintiff, Equitrade Atlanta was to absorb the BCI members and EI would provide management services to those members. However, disputes soon arose between the parties, including allegations that, *e.g.*, Defendant diverted Equitrade Atlanta funds to her personal use; Defendant refused to allow Equitrade Atlanta to pay EI for the goods and services provided; Plaintiffs locked Defendant out of the BCI/EI office and refused to allow her access to her personal office and belongings; and Plaintiffs learned there was a previously undisclosed tax lien against BCI that should have prevented the sale or transfer of any assets of BCI.

On July 3, 2013, Plaintiffs initiated the 2013 Action against Defendant Busman, BCI, and Lee Anne, Inc. (an entity formed by Defendant to be the majority member of Equitrade Atlanta). In that action Plaintiffs asserted claims against the named defendants for: breach of the 2013 Merger Agreement for failing to remit payment to EI for services rendered; fraud and misrepresentation for purporting to enter into the 2013 Merger Agreement when a tax lien existed against BCI and an agent of BCI had falsely reported to the Internal Revenue Service

("IRS") that BCI was "defunct" and had no assets; conversion regarding Busman's diversion of funds from Equitrade Atlanta; a claim for "bad faith"; a request for injunctive relief and a protective order; quantum meruit; and attorney's fees.

The 2013 Action was originally assigned to the Honorable Constance C. Russell. The parties appeared before Judge Russell on July 18, 2013 and announced that they had reached a settlement agreement the terms of which were described in open court and transcribed in a "Transcript of Settlement Agreement."[3] At that proceeding, counsel for the parties[4] described the settlement terms, Judge Russell made various inquiries regarding certain terms, and the parties with counsel at various points conferred and then would address Judge Russell on the record. In particular, there was considerable discussion regarding the outstanding debt owed to the IRS described as the IRS "Trust Fund Debt", the exact amount of which was unknown at the time. The parties/counsel discussed, *e.g.*, what would happen if the debt was more than anticipated, if they were not able to negotiate that debt down with the IRS, what was meant by the term "Trust Fund Debt" and if that is a term of art understood by all of the parties. Judge Russell in particular pressed the parties regarding the tax issue and the parties/counsel's understanding of the term "Trust Fund Debt":

> **The Court**: Okay. My only question was, the term that they have used is "Trust Fund Debt." Do you all have a shared understanding of what "Trust Fund Debt" means so that if something happens that isn't quite what you had in mind, we all know what "Trust Fund Debt" means? Does it have a meaning in the I.R.S. Code or is it a term that you-all have come up with? Does it have a shared meaning?
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> **Mr. Gordon**: It's I.R.S. terminology, your honor, that they said has to be paid in order for this debt to be satisfied.

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[3] Affidavit of Lee Anne Hearn (f/k/a Lee Anne Busman), Ex. 1 (Transcript of Settlement Agreement Before the Honorable Constance C. Russell, Atlanta Judicial Circuit, July 18, 2013; herein "Transcript of Settlement Agreement").

[4] Sims Gordon, Esq. appeared on behalf of EI and West and Leighton B. Deming, Jr., Esq. appeared on behalf of Busman, BCI and Lee Anne, Inc.

The Court: All right. So, "Trust Fund Debt" has an understood meaning in federal courts. If you're ever having a fight about what "Trust Fund Debt" is, the I.R.S. can tell us what it is.

Mr. Gordon: Yeah, that's correct, Your Honor.

The Court: Mr. Deming, is that right? Do you have a shared understanding as to what "Trust Fund Debt" means?

Mr. Deming: No. I'll tell you why. I deal with the I.R.S. all the time. And I have to deal here with any I.R.S. debt that's owed. Which is - - it is Trust Fund, but that penalties and interest [sic]; they've agreed to sell it for $38,500, fine.

The Court: They who has agreed?

Mr. Deming: The I.R.S.

The Court: Who - - Okay, the I.R.S. is not here.

Mr. Deming: I know.

The Court: So, you-all are assuming that the I.R.S. has said $38,500 and that that is in fact going to work out; and it may very well, okay....

Mr. Deming: Or less.

Mr. Gordon: Your honor, may I - - may I shed some light on it. You know, I handle a big volume of bankruptcy cases, and so what we generally do in those cases - - and this is why we feel like, you know, it should be the Trust Fund Debt, your honor, because the Trust Fund Debt cannot be wiped out We can wipe out the other debt. Right now B.C.I. won't have any assets, so it means they can file bankruptcy and wipe it all out.

The Court: Let me explain something to you.

Mr. Gordon: Yes, yes.

The Court: I'm not trying to resolve your settlement deal. I don't care what your deal is. I simply want you-all, when you walk out of here, to be clear about what your deal is. So if you tell me that "Trust Fund Debt" has a specific meaning and they don't agree that it means the same thing, you don't have a shared understanding.

Mr. Gordon: Give me one second.

(The parties confer.)

Mr. Deming: They'll do it.

Mr. Gordon: Okay, thank you. I think we have a shared meaning.

Mr. Deming: That was correct, wasn't it?

Ms. Collier: Yes, sir.

The Court: All right. You may keep reading.

Mr. Gordon: Thank you.

The Court: And just remember, Mr. West, Ms. Busman, if you don't stand up, you live with what they say. Go ahead…[5]

At the conclusion of the proceeding Judge Russell noted the parties' agreement had been read into the record and declared: "Based upon the representations of counsel and the affirmative responses of the parties, it's accepted by the court."[6] Although the parties were to "close" the agreement by August 9, 2013, they ultimately failed to close the settlement.

On or about August 7, 2013, the IRS sent "Sims W. Gordon, Jr. Attorney for James Alan West" a notice of the liens on BCI's tax debt.[7] According to the notice: "The amount owed on the tax liabilities included on the notice(s) of federal tax lien filed against Barter Consultants International is $140,676.80 computed to 09/05/2013."

On August 15, 2013, the 2013 Action was transferred to this Court. After additional negotiations, on July 18, 2014, the parties reached a settlement and executed a Settlement Agreement and General Mutual Release (the "Settlement Agreement").[8] Under the Settlement

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[5] Affidavit of Lee Anne Hearn (f/k/a Lee Anne Busman), Ex. 1 (Transcript of Settlement Agreement before the Honorable Constance C. Russell, Atlanta Judicial Circuit, July 18, 2013; herein "Transcript of Settlement Agreement") at pp. 7-9.

[6] Id. at p. 15.

[7] Affidavit of Lee Anne Hearn (f/k/a Lee Anne Busman), Ex. 2 (IRS August 7, 2013 BCI Tax Notice).

[8] Affidavit of Lee Anne Hearn (f/k/a Lee Anne Busman), Ex. 3 (Settlement Agreement and General Mutual Release).

Agreement EI and/or West were to pay Busman, individually, $72,000.00 at a rate of $1,500.00 per month for 48 consecutive months in payments made payable to the Kevin T. Moore, P.C. IOLTA Trust Account.[9] The parties also executed a Consent Judgment which could be filed with the Court for entry upon submission of an affidavit from Busman's counsel of nonpayment and default by EI/West.[10]

The Settlement Agreement included a provision specifically addressing the "Internal Revenue Service Debt":

> 5. Internal Revenue Service Debt. There is an Internal Revenue Service Trust Fund debt, which is owed. **James West and/or Equitrade International, Inc. have agreed and shall become responsible for and assume the entire Trust Fund Debt and the charges directly associated therewith owed to the Internal Revenue Service on behalf of Lee Anne Busman and Barter Consultants International, Inc. and shall indemnify and hold harmless Lee Anne Busman and Barter Consultants International, Inc. for said debt so owed to the Internal Revenue Service**. Lee Anne Busman will execute any and all documents needful and necessary to allow James West and Equitrade International, Inc. to be able to speak with the Internal Revenue Service to negotiate and/or pay the owned amount to the Internal Revenue Service. James West will notify and provide to Kevin T. Moore, Esq. evidence when all amounts owed to the Internal Revenue Service are paid in full within five business days of receipt of documentation evidencing full satisfaction of debt [sic].[11]

The Settlement Agreement also included broad mutual releases of all claims:

> 3. Mutual Releases. For and in consideration of the monies to be paid and mutual agreement to waive all past, present, and future claims the Parties may have against each other related to the Superior Court litigation, the parties do hereby, on behalf of themselves, their respective former and current agents, attorneys, officers, managers, directors, employees, associated companies, affiliated companies, subsidiaries, sureties, and successors and assigns, **do hereby release and forever discharge the other party(ies) named or described above from any and all lawsuits, causes of action, claims, demands, costs, and obligations of any kind**

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[9] Affidavit of Lee Anne Hearn (f/k/a Lee Anne Busman), Ex. 3 (Settlement Agreement and General Mutual Release) at ¶1.

[10] Id. at ¶2.

[11] Id. at ¶5 (emphasis added).

> **or nature** whatsoever, both known and unknown, to person and property, **which have resulted in the past, which exist at present, or which may in the future arise related to the Superior Court litigation and/or the relationship among any of the Parties hereto as of the date of this Agreement. THIS IS A FULL MUTUAL RELEASE AND SHALL BE CONSTRUED AS BROADLY AS POSSIBLE** TO CONSTITUTE A FULL, FINAL AND COMPLETE RELEASE OF THE RELEASED PARTIES FROM ALL CLAIMS, DEMANDS, DAMAGES AND CAUSES OF ACTION. Notwithstanding the foregoing, this release shall not extend to any claims arising from a breach of this Agreement.[12]

Beginning in August 2014, Busman received monthly payments of $1,500 per the Settlement Agreement for 10 months. Thereafter she did not receive any other payments.[13] Busman avers that West falsely informed the IRS that the $72,000 owed to her was in payment for a customer list that had previously belonged to BCI. However, Busman alleges that assertion was false as EI had possession and use of the customer list for at least three (3) years prior to the parties' settlement.[14] Nevertheless, as a result, it appears the IRS issued a Notice of Levy with respect to BCI to withhold all payments made by EI and/or West to the Law Firm of Kevin T. Moore, P.C. on behalf of Lee Anne Busman.

Upon the failure of Plaintiffs to continue to make payments to Busman pursuant to the Settlement Agreement, this Court ultimately entered the parties' Consent Judgment, granting Busman a money judgement in the amount of $72,000 (minus payments previously made). The Court also denied Plaintiffs' motions seeking to set aside that judgment, finding that under the Settlement Agreement, EI and West were obligated to pay money to Busman, individually, and to satisfy BCI's Trust Fund Debt on behalf of Busman and BCI.[15] The Court specifically found:

> By submitting the payments due to [Busman] to the IRS in satisfaction of the tax debt, Plaintiffs are not satisfying the letter or the spirit of the

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12 Affidavit of Lee Anne Hearn (f/k/a Lee Anne Busman), Ex. 3 (Settlement Agreement and General Mutual Release) at ¶3 (capitalized emphasis in original; bold emphasis added).

13 Affidavit of Lee Anne Hearn (f/k/a Lee Anne Busman) at ¶20.

14 Id. at ¶21.

15 2013 Action, Order entered October 10, 2016.

> Settlement Agreement. Instead they are using money owed to [Busman] to satisfy the IRS debt that they also agreed to pay. West and Equitrade cannot avoid their obligation to pay past due taxes on the Trust Fund Debt by redirecting the $72,000 owed individually to [Busman] to the IRS.[16]

Separately, Busman initiated garnishment proceedings against Plaintiffs. Amid ongoing disputes regarding whether Plaintiffs had satisfied their obligations under the Settlement Agreement, including with respect to paying the IRS debt and the sums owed to Busman personally, Plaintiffs initiated this action on February 24, 2017. They then filed the 2017 Action for Injunctive Relief on May 2, 2017, seeking a temporary restraining order, preliminary injunction, and permanent injunction for injunctive relief prohibiting Busman "from engaging in any further discovery and collection efforts against Plaintiffs, through garnishment, levy or otherwise pending the full adjudication of this cause."[17]

Plaintiffs concede that under the Settlement Agreement they agreed to pay the Trust Fund Debt. Plaintiffs assert they did so but, upon receipt of a formal Notice of Levy directing them to remit to the IRS all payments due to Defendant Busman, they thereafter directed their payments to the IRS as directed.[18] Plaintiffs also contend that they have satisfied the Trust Fund Debt in full. Specifically, Plaintiffs requested confirmation from the IRS of the amount due solely under the Trust Fund Debt and received written confirmation on June 9, 2015 that the outstanding Trust Fund Debt was $15,754.77.[19] Plaintiffs assert they thereafter engaged in investigations that revealed a number of both state liabilities (Georgia Department of Revenue and Georgia Department of Labor) and federal tax liabilities.

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16 2013 Action, Order entered October 10, 2016, p. 7.

17 *See* 2017 Action for Injunctive Relief, Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction, p. 2. The 2017 Action for Injunctive Relief was transferred to this Court on September 29, 2017. The Court denied Plaintiffs' requests for injunctive relief on December 5, 2017 and ultimately dismissed the action on November 16, 2018.

18 Verified Complaint, Ex. C (Notice of Levy).

19 Verified Complaint, Ex. D (IRS letter dated June 9, 2015 from L. Jones, Revenue Officer). The Court notes that the letter states "the total of the trust fund recovery **penalty** today is $15,754.77" (emphasis added).

Of the federal liabilities, allegedly $3,233.00 are for 1120 taxes (income tax liabilities); $352.18 are for 940 taxes (unemployment tax liabilities); together resulting in 6721 civil penalties of over $54,000. Plaintiffs allege these liabilities and the Georgia Department of Revenue and Department of Labor liabilities were not disclosed at any time and that Defendant claimed that her taxes were current. According to Plaintiffs:

> The June 9, 2015 correspondence, balance of payments remitted to the IRS in satisfaction of the Levy Notices, and total Liens and FIFAs outstanding upon BCI and Defendant make it clear that the Levy Notices served upon Plaintiffs are not for the Trust Fund debt, but for other unrelated federal income tax, state income tax and Department of Labor liabilities.
>
> The unrelated federal income tax, state income tax and Department of Labor liabilities not comprising the Trust Fund debt (a) have been in existence since prior to the purported sale by Defendant of the assets of BCI and liabilities of Defendant and BCI to EI; (b) have been known by Defendant since prior to the purported sale by Defendant of the assets of BCI and liabilities of Defendant and BCI to EI; and (c) relate to debts of Defendant and imposed upon the assets of BCI acquired from Defendant, all of which Defendant knowingly, purposefully and fervently withheld.[20]

Plaintiffs also alleges Busman had actual notice of each of the liens and FIFAs in existence since prior to the filing of the 2013 Action, creation of the July 18, 2013 Transcript of Settlement Agreement before Judge Russell, and negotiations that resulted in the Settlement Agreement.

In this action, Plaintiffs assert claims against Defendant Busman for: (1) fraud in the factum; (2) fraud in the inducement; and (3) unjust enrichment. Defendant Busman, in turn, asserts counterclaims against EI and West, alleging they are attempting to avoid collection of the sums owed to Busman by filing this lawsuit related to the same dispute and tax issues addressed in the 2013 Action. Busman asserts claims against EI and West for: (1) fraud and misrepresentation; (2) conversion/trover; (3) unjust enrichment; (4) punitive damages; and (5) "stubborn litigiousness" (seeking attorney's fees and costs under O.C.G.A. §13-6-11).

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[20] Consolidated Pre-Trial Order, ¶6 (Plaintiffs' outline of the case and contentions) at p. 7.

ANALYSIS

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Standard on Summary Judgment

Summary judgment should be granted only when the movant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c). "A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case." Scarbrough v. Hallam, 240 Ga. App. 829, 830, 525 S.E.2d 377, 378 (1999) (quoting Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474, 475–76 (1991). To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [O.C.G.A. §9-11-56], must set forth specific facts showing that there is a genuine issue for trial." O.C.G.A. §9-11-56(e).

"[A]t the summary judgment stage, courts are required to construe the evidence most favorably towards the nonmoving party, who is given the benefit of all reasonable doubts and possible inferences." Smith v. Tenet Health Sys. Spalding, Inc., 327 Ga. App. 878, 879, 761 S.E.2d 409, 411 (2014) (citations and punctuation omitted). *See* Word v. Henderson, 220 Ga. 846, 848, 142 S.E.2d 244, 246 (1965) ("Where the evidence on motion for summary judgment is ambiguous or doubtful, the party opposing the motion must be given the benefit of all reasonable doubts and of all favorable inferences and such evidence construed most favorably to the opposing party opposing the motion"). However, "[m]ere speculation, conjecture, or possibility [are] insufficient to preclude summary judgment." State v. Rozier, 288 Ga. 767, 768 (2011) (quoting Rosales v. Davis, 260 Ga. App. 709, 712, 580 S.E.2d 662, 665 (2003)).

B. Conclusions of Law

Defendant Busman has moved for summary judgment with respect to all claims asserted against her. The Court is compelled to note that Defendant filed her Motion for Summary Judgment on September 17, 2018. On October 10, 2018, Plaintiff EI filed a Notice of Request for Mediation. On October 24, 2018, EI filed Plaintiff Equitrade International, Inc.'s Response and Reservation of Right to File Brief in Opposition to Defendant's Motion for Summary Judgment. In that filing EI includes its "Statement of Facts in Opposition to Defendant's Motion for Summary Judgment" but does not include citations to the record other than generally incorporating by reference Defendant Busman's entire deposition.

In the foregoing filing EI argues Defendant's motion should be denied because: factual questions exist regarding "the extent to which Defendant's acts may be deemed to be Fraud in the Factum and/or Fraud in the Inducement and result in Unjust Enrichment to Defendant"; and there is evidence of "Defendant's actual knowledge of tax liabilities of BCI not disclosed to Plaintiffs prior to the formation of Equitrade Atlanta, prior to the initial Trial Transcript Settlement Agreement, prior to the formation of Equitrade Atlanta [sic], prior to the settlement reduced to Transcript, the Settlement Agreement [sic], and prior to Defendant's acts of garnishment."[21] EI's filing also includes a "Request for Accommodation" (requesting an accommodation in the late filing of the response citing an injury suffered by Plaintiff's counsel on September 26, 2018 and counsel's belief the response had been timely filed by office staff) and a "Request to Reserve Right to File Brief" whereby EI purports to reserve its right to file a

[21] Plaintiff Equitrade International, Inc.'s Response and Reservation of Right to File Brief in Opposition to Defendant's Motion for Summary Judgment, p. 5.

brief in support of its response "unless this Court requests otherwise." However, no supplemental response has been submitted by EI.

Plaintiff James Alan West, who according to the parties' Consolidated Pre-Trial Order is appearing in this matter *pro se*, did not file any response to Defendant's Motion for Summary Judgment and he did not appear at the March 15, 2019 hearing. *See* Rapps v. Cooke, 234 Ga. App. 131, 131–32, 505 S.E.2d 566, 568 (1998) ("A failure to respond to a motion for summary judgment results in waiver of the right to present evidence in opposition to the motion, but the moving party must still show from the pleadings and the evidence that summary judgment is appropriate"); Fowler v. Smith, 237 Ga. App. 841, 842, 516 S.E.2d 845, 847 (1999) (same).

At the request of and with the consent of all parties, the Court deferred consideration of Defendant's Motion for Summary Judgment on multiple occasions to allow the parties an opportunity to privately mediate their dispute and to obtain necessary tax documents from the IRS to inform their settlement discussions. *See, e.g.*, Scheduling Order entered November 16, 2018; Amended Scheduling Order entered December 14, 2018; and Order Continuing and Resetting Summary Judgment Hearing entered on March 4, 2019. In short, the parties have been afforded ample opportunity to pursue mediation, to attempt to negotiate a settlement of their dispute, to obtain necessary information with respect to their claims and defenses, and to address the pending Motion for Summary Judgment.

1. Fraud claims

Fraud in the factum and fraud in the inducement are species of fraud. Specifically, fraud in the factum is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents." Bellamy v. Resolution Tr. Corp., 266 Ga. 630, 631, 469 S.E.2d 182, 184 (1996) (citation omitted). *See, e.g*, Straus v. Renasant Bank, 326 Ga. App.

271, 275, 756 S.E.2d 340, 344 (2014) (where lender brought action against borrower and personal guarantors to collect unpaid loan, finding the guarantors' claim of fraud in the factum was not supported because the evidence showed they knew they were signing a guaranty such that they could not contend their signature was procured without knowledge of the true nature of the document they were signing).

"To establish a claim for fraud in the inducement, or inceptive fraud to enter into a contract, a plaintiff must prove both that the defendant failed to perform a promised act and that the defendant had no intention of performing when the promise was made." Nash v. Roberts Ridge Funding, LLC, 305 Ga. App. 113, 116–17, 699 S.E.2d 100, 102 (2010) (citing Cowart v. Gay, 223 Ga. 635, 636–637(1), 157 S.E.2d 466 (1967)). "Evidence showing nothing more than the parties' disagreement regarding the interpretation of a contract's terms is inadequate to support an inceptive fraud claim." Nash, 305 Ga. App. at 117 (citations omitted).

As explained by the Court of Appeals of Georgia:

> [T]he test of the defense of fraud in the factum is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. The primary difference between these two types of fraud [*i.e.* fraud in the factum and fraud in the inducement] lies in the parties' understanding of the contract into which they are entering. If a party understands the nature of the contract [it is] executing but contends that there has been some material misrepresentation as to the obligations [a]rising thereunder, only a fraud in the inducement claim will lie.

Straus, 326 Ga. App. at 275 (quoting Bank of the Ozarks v. Khan, 903 F.Supp.2d 1370, 1378(III) (N.D.Ga.2012)).

Importantly, "[i]n order to prove fraud, the plaintiff must establish five elements: (1) a false representation by a defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff." Engelman v.

Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017) (citing Sun Nurseries, Inc. v. Lake Erma, LLC, 316 Ga.App. 832, 835 (1), 730 S.E.2d 556 (2012)).

> As to the element of justifiable reliance, it is not sufficient to show that false representations were knowingly made with an intent to deceive—there must also be proof that due care was exercised to discover the fraud. Charter Med. Mgmt. Co. v. Ware Manor, Inc., 159 Ga.App. 378, 380, 283 S.E.2d 330 (1981). "Misrepresentations are not actionable unless the complaining party was justified in relying thereon in the exercise of common prudence and diligence." (Citation and punctuation omitted.) Id. at 383, 283 S.E.2d 330. Moreover, a party is not justified in relying on and assuming to be true representations consisting of mere expressions of opinion, hope, expectation, puffing, and the like; rather, representations of this nature must be inquired into and examined to ascertain the truth. Id.; Wilkinson v. Walker, 143 Ga.App. 838, 839, 240 S.E.2d 210 (1977).

Todd v. Martinez Paint & Body, Inc., 238 Ga. App. 128, 128–29, 517 S.E.2d 844, 846 (1999).

Here, with respect to the fraud in the factum claim, there is no evidence that Plaintiffs signed or otherwise entered into any agreement "without knowledge of its true nature or contents." Moreover, the record and protracted nature of the parties' settlement negotiations from 2013 plainly belie any assertion by Plaintiffs that they had no reasonable opportunity to obtain knowledge regarding the agreements they were entering into. To the extent Plaintiffs claim some fraud, misunderstanding or misrepresentation regarding the nature or contents of the 2013 Merger Agreement, any claims arising thereunder were mutually released under the parties' Settlement Agreement.

Further, to the extent Plaintiffs claim some fraud, misunderstanding or misrepresentation regarding the nature or contents of the executed Settlement Agreement, including what taxes were in dispute and what taxes constituted the "Trust Fund Debt" to be paid by Plaintiffs, again the record belies this contention. As noted above, the parties with the full benefit of counsel had an extensive discussion among themselves and with Judge Russell at the July 18, 2013 proceeding about the tax issues relevant to the parties' dispute. Thus, they were plainly on notice

of those issues which were ultimately addressed in the Settlement Agreement executed a year later on July 18, 2014. Moreover, there is record evidence that on or about August 7, 2013 (before the written Settlement Agreement was executed) the IRS sent Plaintiffs' counsel a notice indicating that as of September 5, 2013 "[t]he amount owed on the tax liabilities included on the notice(s) of federal tax lien filed against" BCI were $140,676.80. Thus, Plaintiffs were well aware of the federal liens against BCI before they executed the Settlement Agreement in 2014.

Additionally, to succeed on either fraud claim, Plaintiffs must show justifiable reliance, *i.e.* "there must also be proof that due care was exercised to discover the fraud." Todd, 238 Ga. App. at 128–29. In light of the protracted discussions and negotiations surrounding the tax liabilities at issue, admissions during the July 18, 2013 proceeding before Judge Russell that the parties were not sure of the exact amount that was owed, and the August 7, 2013 notice provided by the IRS, it is plainly clear that Plaintiffs were on notice of the tax issues. Plaintiffs, thus, had an obligation to exercise due care before settling their claims and ultimately agreeing to "become responsible for and assume the entire Trust Fund Debt and the charges directly associated therewith owed to the Internal Revenue Service on behalf of Lee Ann [isc] Busman and Barter Consultants International, Inc."

Having failed to do so, Plaintiffs' fraud claims fail as a matter of law and the parties are bound by their executed Settlement Agreement. Notably, under the Settlement Agreement Plaintiffs not only expressly "agreed to be responsible for and assume the entire Trust Fund Debt and the charges directly associated therewith owed to the [IRS] on behalf of [Defendant] and [BCI]," they also expressly agreed to "indemnify and hold harmless [Defendant] and [BCI] for said debt so owed to the [IRS]." These undisputed facts undercut Plaintiffs' theories of recovery

entirely. Defendant's Motion for Summary Judgment as to the fraud in the factum and fraud in the inducement claims is hereby GRANTED.

2. Unjust Enrichment

"[U]njust enrichment applies when as a matter of fact there is no legal contract…but where the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefited party equitably ought to return or compensate for." Engram v. Engram, 265 Ga. 804, 806, 463 S.E.2d 12, 15 (1995) (quoting Smith v. McClung, 215 Ga. App. 786, 789(3), 452 S.E.2d 229 (1994)).

> "The theory of unjust enrichment is basically an equitable doctrine that the benefitted party equitably ought to either return or compensate for the conferred benefits when there was no legal contract to pay." (Citations omitted.) Hollifield v. Monte Vista Biblical Gardens, 251 Ga.App. 124, 130(2)(c), 553 S.E.2d 662 (2001). "The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received." (Citation and punctuation omitted.) Id. at 131(2)(c), 553 S.E.2d 662. For unjust enrichment to apply, "the party conferring the labor and things of value must act with the expectation that the other will be responsible for the cost." Id. Otherwise, that party, like one who volunteers to pay the debt of another, has no right to an equitable recovery. Id.

Morris v. Britt, 275 Ga. App. 293, 294, 620 S.E.2d 422, 424 (2005). "[A] claim for unjust enrichment is not a tort, but an alternative theory of recovery if a contract claim fails." Wachovia Ins. Servs., Inc. v. Fallon, 299 Ga. App. 440, 449, 682 S.E.2d 657, 665 (2009) (quoting Tidikis v. Network for Med., etc., 274 Ga. App. 807, 811(2), 619 S.E.2d 481 (2005)). Thus, "[a]n unjust enrichment theory does not lie where there is an express contract." Donchi, Inc. v. Robdol, LLC, 283 Ga. App. 161, 167, 640 S.E.2d 719, 724 (2007) (quoting Pryor v. CCEC, Inc., 257 Ga.App. 450, 452(4), 571 S.E.2d 454 (2002)).

Here, Plaintiffs allege the following constitutes an unjust enrichment to Defendant Busman: "[r]eceipt of the payments due under the Settlement Agreement while receiving the benefit of payments of the same amount to the IRS for and on behalf of Defendant"; [r]eceipt of the funds by Defendants for the sale of BCI's assets when the assets are subject to multiple liens which liens have resulted in levies being satisfied by Plaintiffs"; and "[r]eceipt by Defendant of funds through garnishment and other collection efforts bypassing the IRS liens and levy being satisfied by Plaintiffs."[22]

However, the money to be paid to Busman personally and the separate "Internal Revenue Service Debt" assumed by EI/West are express provisions of the parties' written Settlement Agreement. As such, as a matter of law a claim for unjust enrichment will not lie for disputes arising thereunder. Accordingly, Defendant's Motion for Summary Judgment with respect to the unjust enrichment claim is GRANTED.

II. DEFENDANT'S COUNTERCLAIMS

As noted above, in this action Busman asserts counterclaims against EI and West for: (1) fraud and misrepresentation; (2) conversion/trover; (3) unjust enrichment; (4) punitive damages; and (5) "stubborn litigiousness" (seeking attorney's fees and costs under O.C.G.A. §13-6-11). As discussed at the March 15, 2019 hearing and as agreed by all parties/counsel present at the hearing, the foregoing claims are duplicative and/or seek duplicative relief as has already been awarded to Busman under the Consent Judgment that was issued in the 2013 Action. As such, the Court hereby DISMISSES Defendant's counterclaims.

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22 Verified Complaint, ¶¶ 69-71.

CONCLUSION

Having considered the entire record and given all of the above: Defendant's Motion for Summary Judgment is GRANTED; and Defendant's counterclaims are DISMISSED without objection by Defendant. Insofar as there are no remaining claims for adjudication in this action, this constitutes a FINAL ORDER in this matter and the Clerk of the Court is directed to mark this case CLOSED.

SO ORDERED this 18 day of March, 2019.

JOHN J. GOGER, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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